property is sold under the law by the assignee. The loss provided for in this policy accrued while the property was in this condition. It was still in law Wells's property, but by operation of law in the hands of the assignee for the sole purpose of selling and of applying the proceeds for Wells's benefit.

Decree for petitioner.

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*Supreme Court of Pennsylvania.*

HEASTINGS *v.* McGEE.

When the vendor of personal property makes fraudulent representations in regard to its value, or is otherwise guilty of fraud in making or performing the contract, the vendee has his election of remedies for the injury; he may stand to the bargain even after he has discovered the fraud, aud recover damages on account of it, or he may rescind the contract and recover back what he has paid.

If he elects the former remedy and sues in case for the deceit, he is not bound to return or make tender of the property.

THIS was an action on the case for deceit in the sale of a horse. The jury found, under instructions of the court, that the horse was fatally diseased at the time of the sale, and that the defendant knew it, and assessed the plaintiff's damages at $103.50, subject to the opinion of the court on the question of law reserved, viz.: Whether the plaintiff having failed or neglected to offer to return the horse to the defendant, but on the contrary having retained and destroyed the animal without having made any such offer, can maintain this action for purchase-money? On the hearing of the reserved question, the court directed judgment to be entered in favor of the defendant *non obstante veredicto*, whereupon the plaintiff took a writ of error to this court.

The opinion of the court was delivered by

WILLIAMS, J.—Where the vendor of personal property makes fraudulent representations in regard to its value, or is otherwise guilty of fraud in making or performing the contract, the vendee has his election of remedies for the injury; he may stand to the bargain, even after he has discovered the fraud, and recover damages on account of it, or he may rescind the contract and recover back what he has paid: Sedg. Dam. 296; 2 Kent's Com. 480, note A.; *Weston* v. *Downes*, 1 Dougl. 23; *Towers* v. *Barret*, 1 Term 133; *Boorman* v. *Jenkins*, 12 Wend. 566; *Waring*

v. *Mason*, 18 Id. 425; *Whitney* v. *Allaire*, 4 Denio 554. In the case last cited JEWETT, J., says: A return of the property to the vendor, or an offer to return, is in no case necessary, except to enable the vendee to withhold or recover back the price. When there is an actual disaffirmance of the contract, the title to the property is revested in the vendor. In all cases of fraud, the vendee, who alone has the right of disaffirmance, may remain silent and bring his action to recover damages for the fraud, or may rely on it by way of defence to the action of the vendor, although there has been a full acceptance by him, with knowledge of the defects in the property. An affirmance of the contract by the vendee, with such knowledge, merely extinguishes his right to rescind the sale. His other remedies remain unimpaired. The vendor can never complain that the vendee has not rescinded." The distinction between these two forms of action, as a remedy for the fraud, is recognised in *Pearsoll* v. *Chapin*, 8 Wright 14, the case mainly relied on by the court below to sustain its ruling of the reserved question. There the action was assumpsit to recover back the price paid for the land, and it was held that the vendee must first tender a reconveyance. And why? Because his action was in disaffirmance of the contract, and "he must show that he had rescinded it by doing all that was necessary and reasonably possible to restore the parties to the condition in which they were before the contract." If he has done this, he may waive his action of tort for the fraud, and sue in *assumpsit* for the money which he paid on the contract. But "he who sues for damages for the fraud, say the court, affirms the validity of the contract, *Junkins* v. *Simpson*, 2 Shep. 364; *Whitney* v. *Allaire*, 4 Denio 554; or who knowingly accepts or retains any benefit under it; *Share* v. *Anderson*, 7 S. & R. 63; *Wilson* v. *Bigger*, 7 W. & S. 125; *Gutzweiler* v. *Lackman*, 23 Mo. 168; or who uses the property as his own after the discovery of the fraud, *McCulloch* v. *Scott*, 13 B. Mon. 172; *Dill* v. *Comp*, 22 Ala. 249." And therefore it is that a count for damages for the fraud, and one for a rescission of the contract, are repugnant. Here the declaration is not in assumpsit to recover back the price paid for the horse, but in case to recover damages for the alleged deceit, and as the authorities show, the plaintiff was not bound to offer to return the horse before he could maintain the action. The court, therefore, fell into an error in deciding that he was

not entitled to recover because he had not offered to return the horse. The attention of the learned judge does not seem to have been directed to the pleadings, and he was doubtless led into the error of treating the case as an action of *assumpsit* to recover back the price paid for the horse by the form in which the point was presented and the question reserved. The judgment must therefore be reversed, and the cause sent back to be tried on the issue formed by the pleadings.

The gist of the action is the alleged fraud and deceit of the defendant in inducing the plaintiff to buy the horse, believing him to be of usual and ordinary health and soundness, and the plaintiff's right to recover turns on the question whether the defendant was guilty of the fraud and deceit with which he is charged. If he was not, the plaintiff is not entitled to recover though the defendant may have known that the horse was fatally diseased at the time of the sale.

Judgment reversed, and a *venire facias de novo* awarded.

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*United States District Court, Eastern District of Wisconsin. In Admiralty.*

## THE PROPELLER FREMONT.

A vessel employed on the lakes, between a port of the United States and a foreign port, having shipped a seaman on verbal promise of certain wages, and no shipping articles having been signed, the seaman may leave the vessel at any time. If the seaman has drawn the full wages promised, and does not demand more before leaving, he cannot recover a larger amount.

THE propeller was employed in trade between the port of Sarnia, in Canada, and the city of Chicago, in connection with the Grand Trunk Railroad. On the 24th of May, 1870, at Chicago, the libellant shipped on board as first mate on verbal contract with the master, at seventy dollars per month, no shipping articles being signed. Libellant continued in service on board, drawing his wages from time to time as he wanted money, until the 31st of October following, when he left the vessel at Milwaukee, having drawn his full wages at the rate of seventy dollars per month, and not making demand for any larger sum. The vessel was on a trip from Sarnia to Chicago, when libellant left, having notice to return on board as the vessel was ready to